



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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*Peter F. Kilmartin, Attorney General*

**VIA EMAIL ONLY**

June 25, 2015  
OM 15-11

Ms. Gina Fuller

**RE: Fuller v. Westerly Town Council**

Dear Ms. Fuller:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Westerly Town Council ("Town Council") is complete. By email correspondence dated February 17, 2015, you allege the Town Council violated the OMA during its December 8, 2014 meeting, when it improperly met with the School Committee Chairperson in executive session. You also allege the Town Council met in executive session for an improper purpose. More specifically, you allege the Town Council met with the School Committee Chairperson to develop interview questions, establish qualifications and obtain advice regarding municipal positions, including the position of Assistant Solicitor for Schools.

In response to your complaint, we received a substantive response from the Special Legal Counsel for the Town Council, Michael A. Ursillo, Esquire, who provided affidavits from the Town Council President, Mr. Christopher A. Duhamel, and the School Committee Chairperson, Mr. David B. Patten. Attorney Ursillo states, in pertinent part:

"On December 8, 2014, the Town Council held a publicly-noticed public meeting, Item 2(a) of the agenda for that meeting, \* \* \* indicates that the Town Council intended to convene into executive session under § 42-46-5(a)(1) of the OMA to interview candidate for municipal solicitors and judges.[ ] The first portion of the minutes of the executive session, entitled 'Interview for Assistant Solicitor for Schools,' states in pertinent part as follows: 'David Patten, Chair of the School Committee, was invited into this Executive Session. He explained the role of the School Solicitor \* \* \*

Mr. Patten [attended] the executive session solely to explain the role of the Assistant Solicitor for Schools, given that four of the seven members of the Town

Council were newly elected in November 2014. Mr. Patten's role at the executive session was limited to explaining the scope of this position to the Town Council. Mr. Patten did not question the candidates, did not provide a recommendation to the Town Council, and was not present during the Council's deliberations or vote for the position of Assistant Solicitor for Schools. \* \* \*

At a regular meeting of the School Committee on December 17, 2014, Mr. Patten provided an explanation to the School Committee of his role in the executive session. The relevant portions of the minutes, \* \* \* states as follows: '[Mr. Patten] shared that his involvement in the process was misrepresented. He was asked by the Town Council president on Sunday [December 7, 2014] to attend the meeting on Monday [December 8, 2014] in the role of answering questions members [of the Town Council] may have. He was not present during deliberations or the vote and did not make any recommendations [to the Town Council.]' \* \* \*

As the affidavits from Mr. Duhamel and Mr. Patten indicate, Mr. Patten's role at the executive session was limited to explaining to the Town Council the role of the Assistant Solicitor for Schools. There is no basis for Ms. Fuller's allegation that Mr. Patten 'provided advice, establish[ed] qualifications, and develop[ed] question[s] to ask prospective candidates' for the position."

Mr. Duhamel states, in pertinent part:

"On December 8, 2014, I attended a meeting of the Westerly Town Council.

During that meeting, the Town Council convened into executive session to interview candidates for town solicitor and probate judge, as well as an Assistant Solicitor for Schools.

David B. Patten, Chair of the Westerly School Committee, was invited to and attended a portion of the executive session at that meeting.

I invited Mr. Patten to attend the executive session solely to explain the role of Assistant Solicitor of Schools, given that four of the seven members of the Council were newly elected to the Council in November 2014.

Mr. Patten was present during a portion of the executive session, during which time the Town Council interviewed four candidates for the position of Assistant Solicitor for Schools.

As the minutes of the executive session indicate, Mr. Patten's role at the executive session was limited to explaining the role of the Assistant Solicitor of Schools.

Although Mr. Patten observed the Town Council interview candidates for Assistant Solicitor for Schools, he neither questioned the candidates nor engaged in discussion with the Town Council regarding the candidates.

Mr. Patten did not engage in developing interview questions, establishing qualifications, or providing advice to the Town Council regarding the interview process or candidates for Assistant Solicitor for Schools.

Mr. Patten left the executive session before the Council began its deliberations on the candidates and was not present for any portion of the Council's deliberations or vote on the position of Assistant Solicitor for Schools.

The entirety of the executive session was devoted to interviewing candidates for various municipal positions, including an Assistant Solicitor for Schools."

Mr. Patten states, in pertinent part:

"In advance of the meeting, [Mr.] Christopher A. Duhamel, the President of the Town Council, invited me to attend the executive session solely to explain the role of Assistant Solicitor for Schools, given that four of the seven members of the Council were newly elected to the Council in November 2014.

I was present during a portion of the executive session, during which time the Town Council interviewed four candidates for the position of Assistant Solicitor for Schools.

As the minutes of the executive session indicate, my involvement at the executive session was limited to explaining to the Council the role of Assistant Solicitor for Schools.

Although I observed the Town Council interview candidates for Assistant Solicitor for Schools, I neither questioned the candidates nor engaged in discussion with the Town Council regarding the candidates.

I did not engage in developing interview questions, establishing qualifications, or providing advice to the Town Council regarding the interview process or candidates for Assistant Solicitor for Schools.

I left the executive session before the Council began its deliberations on the candidates and I was not present for any portion of the Council's deliberations or vote on the position of Assistant Solicitor for Schools."

We acknowledge your rebuttal dated April 9, 2015.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning

whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Town Council violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

Based upon the plain language of the OMA, this Department previously opined that:

“[the OMA] does not govern who may attend closed sessions. However, permitting a public body to selectively permit some members to attend a closed session, while precluding others from doing so, would certainly appear to violate the intent of the [OMA].” See e.g., Schmidt v. Ashaway Volunteer Fire Association, OM 97-27.

It appears, based upon this Department’s in camera review of the December 8, 2014 executive session meeting minutes and the audio recording of the executive session meeting, the School Committee Chairperson was present in executive session during the time when the Town Council was interviewing candidates for the position of Assistant Solicitor for Schools. It appears his role was to explain the position of the Assistant Solicitor for Schools since four (4) out of seven (7) Town Council members were new to the Town Council. Respectfully, it also appears that neither the School Committee Chairperson, nor the members of the Town Council, “provided advice, establish[ed] qualifications [nor] develop[ed] questions to ask prospective candidates for Assistant Solicitor for Schools while in executive session with the Town Council.”

Additionally, we observe that the option to extend an invitation to an individual to attend an executive session is held by the public body, and not the individual seeking to attend the executive session. In Finnegan v. Scituate Town Council, OM 96-13, the Scituate Police Chief “asked that Lt. Charles Collins be allowed to be present [in executive session] to assist him . . . in responding to the issues, [because] Lt. Collins as the Chief Administrative Officer of the Department had special knowledge of certain aspects of the job performance issues.” This Department found no violation and stated that “Lt. Collins was not attending as a ‘member of the public,’” but instead, “was attending as a town employee who had information relevant to the Chief’s job performance.” See also Quinlan v. Warwick School Committee, OM 95-01 (attorney “attended the executive session not as a member of the public, but in his capacity as legal counsel for the Committee”); In re: Pawtucket Fire Department, ADV OM 01-02 (Fire Chief’s attendance at a properly closed executive session between the Fire Department and the City of Pawtucket to discuss contract negotiations did not violate the OMA).

Respectfully, as indicated supra, although you contend that someone other than the School Committee Chairperson could have provided the overview to the new Town Council members, the OMA does not expressly govern who may attend executive or closed sessions and we find nothing within the OMA, nor are we directed to any provision, that would enable us to conclude that the Town Council violated the OMA by including the School Committee Chairperson during the portion of the executive session where the Town Council was interviewing candidates for the position of Assistant Solicitor for Schools. There is no question that since the Town Council was

interviewing for the position of Assistant Solicitor for Schools, the attendance of the School Committee Chairperson was reasonably related to the purpose of the executive session. Accordingly, we find no violation.

We next turn to your allegation that the Town Council met in executive session for an improper purpose, namely, to develop interview questions, establish qualifications and obtain advice regarding municipal positions, in violation of R.I. Gen. Laws § 42-46-5(a)(1). This section of the OMA permits any discussion of the job performance, character, or physical or mental health of a person or persons in closed session. In In re: Town of Charlestown, ADV OM 11-02, the Town Council inquired whether they could meet in executive session under R.I. Gen. Laws § 42-46-5(a)(1) with the Town Administrator to set his performance and evaluation goals for his upcoming annual review. Specifically, we assumed “that setting the Town Administrator’s performance and evaluation goals will involve a discussion of the Town Administrator’s past performance, character, physical and/or mental health when discussing and setting his performance and evaluation goals for his upcoming review.” We concluded that the Town Council “would be permitted to convene into executive session for this discussion provided that it adhere to the provisions for closed meetings as stated in R.I. Gen. Laws § 42-46-4.”

Another finding is The Westerly Sun v. Westerly Town Council, OM 94-01. In seeking to hire a Town Manager, the Town advertised and accepted applications for the position. The Town Council reviewed the applications and, by majority vote of the Town Council, selected certain individuals for an interview. The purpose of the interview was to determine the qualifications of the applicant to serve as Town Manager. This Department determined that “[i]ndeed, the primary goal of job interviews is for both the interviewers and interviewees to discuss job performance, character, or physical or mental health of the applicants.” As such, this Department concluded that the Town Council’s discussions with the applicants concerning their employment qualifications were appropriate for closed session pursuant to R.I. Gen. Laws § 42-46-5(a)(1) and no violation of the OMA occurred. See also Pedro v. Tiverton Personnel Board, OM 96-30 (The Board’s interview of candidates for the position of Chief of Police could appropriately be held in a closed session pursuant to R.I. Gen. Laws § 42-46-5(a)(1)); Friend v. East Greenwich Town Council, OM 13-31 (The East Greenwich Town Council did not violate the OMA when it conducted interviews for the position of Town Manager in executive session with non-employees).

Respectfully, after our in camera review of the executive session minutes and audio recording, we find no evidence that the Town Council met for an improper purpose. As indicated supra, the purpose of an interview is to determine the qualifications of the applicant. The evidence further reveals that the School Committee Chairperson exited the executive session prior to the start of the interviews for the different municipal positions and that the executive session did not consist of establishing qualifications nor developing general interview questions. Instead, our review finds the executive session consisted of interviewing candidates for prospective positions, and in this respect, the School Committee Chairperson explaining the role of the Assistant Solicitor for Schools. As such, we find no violation with respect to this allegation.

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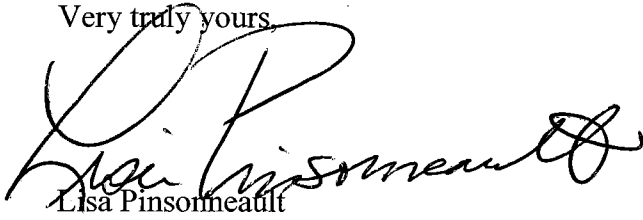
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Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court. The complainant may pursue an OMA complaint within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen. Laws § 42-46-8. Please be advised that we are closing our file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault", with a stylized flourish at the end.

Lisa Pinsonneault  
Special Assistant Attorney General  
Extension 2297

LP/pl

Cc: Thomas J. Capalbo, III, Esquire